Supreme Court, U. S.
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IN THE
Supreme Court of the United States
October Term, 1978

NO. 79-1209

THE COASTAL CORPORATION, OSCAR S. WYATT, JR., H. L. BLOMQUIST, JR., GEORGE L. BRUNDRETT, JR., ERVIN O. BUCK, HAROLD BURROW, ROY L. GATES, CHARLES F. JONES, J. HOWARD MARSHALL, EDWARD J. MOSHER, WILL ODOM AND FLETCHER L. YARBROUGH,

Petitioners,

v.

JOAN WEISBERG,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Petitioners,

-against-

JOAN WEISBERG,

Respondent.

PROCEEDINGS BELOW

The judgment of the Court of Appeals reversed the judgment entered in the District Court pursuant to Fed. R. Civ. P. 54 (b). Petitioner, the Coastal Corporation, ("Coastal") was the only party to the rule 54(b) judgment. The individual petitioners, the directors of Coastal ("director defendants"), were not parties to the rule 54(b) judgment. The rule 54(b) judgment dismissed the first and fifth claim for relief in the original complaint. Plaintiff appealed the dismissal of the first claim for relief, but did not appeal the dismissal of the fifth claim for relief. The rule 54(b) judgment did not affect the other claims for relief alleged in the original complaint.

Coincidentally, on November 8, 1979 the same date that the Court of Appeals reversed the Rule 54(b) judgment in favor of the petitioner Coastal, the District Court entered a judgment in favor of Coastal dismissing the remaining claims for relief in the original complaint and in favor of all of the other defendants dismissing all the claims for relief in the complaint.

On December 31, 1979 the District Court signed an order vacating the District Court judgment that had been entered on November 8, 1979 and granted plaintiff leave to file an amended complaint pursuant to Fed. R. Civ. P. 15. Plaintiff filed an amended complaint. Defendant Coastal and the director defendants have now filed answers to the amended complaint.

The remaining defendants, Julio Iglesias, Selman Holdings, Ltd., and Leonardo Moliero have moved in the District Court to dismiss the amended complaint as to them. They have not filed a petition for a writ of certiorari.

In the first claim for relief in the complaint plaintiff had alleged that the proxy solicitation materials for the election of the directors of Coastal in the years 1974 through 1978 were misleading. The plaintiff's first claim for relief in the original complaint was the sole claim involved on the appeal to the Court of Appeals, and in the petition of Coastal and the director defendants. The first claim for relief in the amended complaint has been amended to allege that in the proxy solicitation materials defendants failed to disclose that the directors had received kickbacks on certain transactions involving Coastal.

QUESTION PRESENTED

Is the solicitation of proxies an essential link in the election of the directors of a publicly held company which election has been challenged because shareholder proxies were solicited from a majority of the shareholders through false proxy solicitation material.

THE PETITION SHOULD BE DENIED

The decision below is clearly correct and in accord with the decisions of the Courts of Appeals and District Courts. They have uniformly held that the proxy solicitation is an essential link in the accomplishment of the election of directors where the election is challenged because of the use of misleading proxy solicitation material.

ARGUMENT

Coastal in its petition to this Court makes the same erroneous contention that it made before the Court of Appeals. The Court of Appeals made pointed reference to Coastal's misstatement of plaintiff's claim in *Weisberg v. Coastal States Gas Corporation,* [Current] Fed. Sec. L. Rep. (CCH) ¶97,168 at 96,437-8 (2d Cir. November 8, 1979) when it held:

> Appellees, in contrast, have urged that we affirm the dismissal on this ground, asserting that "where the transaction authorized by the allegedly false or misleading proxy materials is the election of directors, previous improper corporate payments (as breaches of fiduciary duty) are not approved by shareholders voting for directors, and thus are not caused by the proxy statements." This argument, however, misconstrues plaintiff's claim. In the cases relied on by appellees, the plaintiff sought damages because of allegedly improper payments, which did not require

> shareholder approval. The causal link between the proxy solicitation for the election of directors and the injury complained of—the improper payments—was attenuated at best in the instant case, however, the challenged "transaction" is the election of the directors, and we have no doubt that the "proxy solicitation itself . . . was an essential link in the accomplishment" of the transaction, within the meaning of Mills.

In *Berkman v. Rust Craft Greeting Cards, Inc.*, 454 F. Supp. 787, 793 (S.D.N.Y. 1978) the Court held that where the election of directors was challenged because of the use of a misleading proxy statement to solicit proxies for their election that the proxy solicitation was an essential link in the election of the directors:

> There can be no doubt that the proxy solicitation was an "essential link" in electing the slate of directors. The stock holdings of board members and officers, taken together, are insufficient to constitute a quorum to elect the board. Thus, the solicitation was necessary if the proposed corporate action is to be effected. *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970).

In *Rafal v. Geneen,* [1972-1973 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶93,505, at p. 92,441 (E.D. Pa. 1972) the Court emphasized that the solicitation of proxies for the election of directors is a "transaction for which stockholder approval is sought"

> The election of these persons to the Board of Directors is clearly a "transaction" for which stockholders' approval is sought within the context of §14a. The election of a board of directors may be the most important, and in some cases, the only transaction, in which the stockholder has any significant voice in determining the company's destiny.

The cases where the Courts have sustained attacks on elections of directors because misleading proxy statements were used are legion. *Maldonaldo v. Flynn,* 597 F.2d 789 (2d Cir. 1979); *United States v. Fields,* 592 F.2d 638 (2d Cir. 1978); *Dillon v. Berg,* 326 F. Supp. 1214 (D. Del. 1971) aff'd 453 F.2d 876 (3rd Cir. 1971); *Dillon v. Scotten, Dillon Co.,* 335 F. Supp. 566 (D. Del 1971); *Robinson v. Penn Central Co.,* 336 F. Supp. 655 (E.D. Pa. 1971); *Cooke v. Teleprompter Corp.,* 334 F. Supp. 467 (S.D.N.Y. 1971); *Beatty v. Bright,* 318 F. Supp. 169 (S.D. Iowa 1970); *Securities and Exchange Commission v. Kalvex,* 425 F. Supp. 310 (S.D.N.Y. 1975); *Meer v. United Brands Company,* [1977-1978 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶95,893 (S.D.N.Y. 1977).

Not a single case is cited in the petition where the Court dismissed an equitable claim for relief because the solicitation of proxies was not an essential link in the election where the election of the directors had been challenged on the grounds that misleading proxy material had been used to solicit proxies.

In light of the uniform and substantial weight of authority in accord with the decision of the Court of Appeals no question is presented on the defendants' petition which would justify the granting of the petition for a writ of certiorari.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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